

PAUL M. McCONKIE, USB #5881  
CHRISTIAN C. STEPHENS, USB #9068  
Assistant Attorneys General  
MARK L. SHURTLEFF, USB #4666  
Utah Attorney General  
160 East 300 South, 5th Floor  
Salt Lake City, UT 84114  
Telephone: (801) 366-0290  
Facsimile: (801) 366-0292  
Attorneys for the Executive Secretary

**BEFORE THE UTAH AIR QUALITY BOARD**

**In the Matter of:**

**Sevier Power Company Power Plant  
Sevier County, Utah  
DAQE-AN2529001-04**

**In the Matter of:**

**Unit 3, Intermountain Power Service,  
Millard County, Utah  
DAQE-AN0327010-04**

**EXECUTIVE SECRETARY'S RESPONSE  
AND OPPOSITION TO MOTIONS TO  
APPEAR AS AMICI CURIAE**

COMES NOW the Executive Secretary of the Utah Air Quality Board (hereinafter "Executive Secretary" or "UDAQ"), through undersigned counsel, and submits the following Memorandum in Opposition to the motions filed by Utah Physicians for a Healthy Environment and the National Parks Conservation Association to appear as amici curiae in the above-captioned matters.

**INTRODUCTION**

On August 24, 2007, Utah Physicians for a Healthy Environment (UPHE) and National Parks Conservation Association (NPCA) filed motions to appear as amici curiae. The motions apply to hearings before the Air Quality Board on two Requests for Agency Action filed by the Sierra Club, which are currently pending. The two Requests for Agency Action relate to Approval Orders authorizing the construction and operation of two coal-fired power plants,

issued by the Executive Secretary on October 12, 2004 (to Sevier Power Company) and October 15, 2004 (to Intermountain Power Service Company).

Both Requests for Agency Action are approaching the dates specified for hearing before the Air Quality Board. For reasons stated more fully below, the Executive Secretary opposes UPHE's motion because UPHE appears to seek to participate as amicus in a manner inconsistent with the purpose of the upcoming hearings. If UPHE cures the defects in its motion and the Board imposes reasonable conditions on UPHE's participation, the Executive Secretary does not oppose its motion. The Executive Secretary does not oppose NPCA's motion as it does not appear to suffer from the same defects as the UPHE motion, but would ask for reasonable conditions on NPCA's participation as well.

### **ROLE OF AMICI CURIAE IN ADMINISTRATIVE PROCEEDINGS**

According to Utah Admin. Code R307-103-6(e)(5), in the context of a formal adjudicative proceeding such as this, "[a] person may be permitted by the presiding officer to enter an appearance as amicus curiae (friend of the court), subject to conditions established by the presiding officer." Although the rule is silent on what those conditions should be, decisions of the Utah Supreme Court and other courts provide the Board with the necessary guidance on whether and under what circumstances to allow amici curiae to participate in these proceedings.

#### **A. Amicus Participation Should Be Limited to the Issues Raised by the Parties.**

"It is a 'well-settled rule that an amicus brief cannot extend or enlarge the issues on appeal,' and [the court] will consider only 'those portions of the amicus brief that bear on the issues pursued by the parties to [the] appeal.'" State v. Green, 99 P.3d 820, 829 (Utah 2004) (quoting Madsen v. Borthick, 658 P.2d 627, 629 (Utah 1983)). In its motion, UPHE seeks to enlarge the issues on appeal by requesting "the opportunity to serve as Amicus Curiae to the Air Quality Board for the review of these permits by providing the latest medical information regarding the health effects of air pollution at levels *below* the current ambient air standards." UPHE Motion at 3 (emphasis added).

Although the Board sits in a fact-finding as opposed to an appellate capacity, the same principle applies: the proceedings are limited to those claims raised by the parties. The purpose of the current proceedings is only to determine whether the Executive Secretary properly applied the existing law with respect to the review and issuance of the SPC and IPSC Approval Orders. None of the issues currently before the Board relate to the question of the current adequacy of air pollution law.

Moreover, an amicus brief must make a true contribution to the Board's decision-making process by providing further insight into the claims already raised by the parties. UPHE and NPCA are both correct that in an appellate context, Utah Rule of Appellate Procedure 25 allows an individual to move for leave to file an amicus brief, and requires that the motion "identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae . . . is desirable." The rule does not define "desirable," but the New York Supreme Court has said that an amicus brief is useful (and, presumably, desirable) if it "alert[s] the court to unrepresented implications to persons not parties to the action and . . . bring[s] to the court's attention cases or recent reversals or affirmances of authorities cited by the parties, or other matters, such as legislative history relevant to the matter before the Court." Price v. New York City Bd. of Educ., 837 N.Y.S.2d 507, 516 (N.Y. Sup. Ct. 2007). Conversely, an amicus brief is improper (and, presumably, undesirable) if it "merely reiterates arguments or authority already submitted . . . ." Id. Unlike UPHE, NPCA's motion appears to conform its request to issues already raised. However, to the extent that NPCA's brief would simply function as a "me, too" brief and offer no insight beyond what Sierra Club has already raised, it is improper.

#### B. Inclusion of Factual Material is Improper

UPHE's motion appears to seek permission to include factual material along with its brief. On this issue, the New York Supreme Court explained that inclusion of factual material is almost always improper: "[t]he contents of too many amicus submissions have gone far past their purpose. For example, as an amicus proper function is to advise the court of the law and the

implication of a decision of the Court before it on other matters, the inclusion of factual material is almost always improper. *Factual material submitted to the court by an amicus should not be subject to less scrutiny and contravention by opposing parties than factual material submitted by a party.*” Price, 837 N.Y.S.2d at 516 (emphasis added). Since both UPHE and NPCA are not parties and seek amicus status just a few weeks before the hearings commence (and after discovery has closed), it would be improper and highly unfair to the parties to allow submission by amici curiae of evidence or other factual material outside of the administrative record.

C. Amicus Participation Should Not Improperly Influence the Board

If the Board allows amici to submit briefs, the Board should be wary of being improperly influenced in making its decision on anything other than the facts and the law, and not conforming its decision to political or popular pressure. Materials which may tend to divert the Board from the issues properly before it should not be allowed to be submitted. Price, 837 N.Y.S.2d at 516.

D. Adequacy of the Existing Law is a Not a Subject for a Formal Adjudicative Proceeding.

As noted in Section A, UPHE’s motion is troubling in that UPHE seeks to argue that the existing law is inadequate: “[t]he members of UPHE, like EPA’s CASAC believes [sic] that the most recent medical studies show that the existing ambient air standards currently in use by EPA and AQB are inadequate to protect human health and welfare as well as animal plant life and property and its reasonable enjoyment.” UPHE Motion at 3. However, a formal adjudicative proceeding is an improper forum for determining the adequacy of the law. The Legislature has provided interested citizens with a procedure to petition the Air Quality Board for review of rule adequacy under the Utah Administrative Rulemaking Act. See Utah Code Ann. 63-46a-12(2) (“[a]n interested person may petition an agency to request the making, amendment, or repeal of a rule”). To the extent that UPHE seeks to provide the board with information on “safe levels of mercury, SO<sub>2</sub>, NO<sub>x</sub>, particulate matter and ozone . . . .” that relate to UPHE’s contention that

existing law is insufficient, UPHE must seek relief under the Rulemaking Act. UPHE Motion at 3.

E. Suggested Conditions for UPHE's and NPCA's Participation as Amicus Curiae

As explained above, the Executive Secretary opposes UPHE's appearance as amicus curiae under the conditions UPHE requests in its motion. NPCA's motion is less problematic, although its motion is improper if its brief would essentially mimic the claims of the Sierra Club. Having noted these concerns, the Executive Secretary would not oppose the amicus curiae appearances of UPHE or NPCA, provided that the Board impose reasonable limitations on both appearances as set forth below:

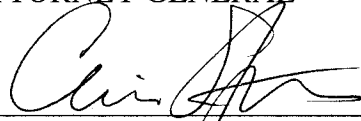
1. UPHE and NPCA each may submit one brief, limited to 15 pages.
2. No evidence outside the administrative record may be presented or referenced, either as attachments to the brief or otherwise.
3. All arguments presented in the brief must be germane to the issues already raised in the Requests for Agency Action filed by the Sierra Club.
4. In light of time constraints, no oral argument will be permitted. In the alternative, if the Board permits oral argument, Sierra Club must share its time with UPHE and NPCA.
5. No calling or questioning of witnesses will be permitted.

**CONCLUSION**

Participation as amici curiae is granted at the discretion of the presiding officer. Under the circumstances, the Board should allow such participation only on the conditions outlined in Section E. Considering the putative amici's late entry into the proceedings, these suggested conditions are fair, reasonable, and would not interfere with the rights of the parties. Absent these conditions, the Executive Secretary respectfully requests that the motions be denied.

DATED this 29<sup>th</sup> day of August, 2007.

MARK L. SHURTLEFF  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Paul M. McConkie", written over a horizontal line.

Paul M. McConkie  
Christian C. Stephens  
Assistant Attorneys General  
For the Executive Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of August, 2007, I caused a copy of the foregoing Executive Secretary's Opposition to Motions for Leave to Appear as Amicus Curiae to be emailed to:

Fred G. Nelson  
Counsel, Utah Air Quality Board  
160 East 300 South, 5<sup>th</sup> Floor  
Salt Lake City, Utah 84114  
fnelson@utah.gov

Christian Stephens  
Paul McConkie  
Assistant Attorneys General  
150 North 1950 West  
Salt Lake City, Utah 84114  
cstephens@utah.gov  
pmcconkie@utah.gov

Fred Finlinson  
11955 Lehi-Fairfield Road  
Saratoga Springs, Utah 84043  
f2fwcrf@msn.com

Michael Keller  
Matthew McNulty  
VanCott Bagley  
50 South Main, Suite 1600  
Salt Lake City, Utah 84114  
mkeller@vancott.com  
mmcnulty@vancott.com

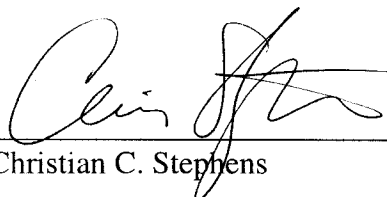
Martin Banks  
Stoel Rives  
201 West Main, Suite 1100  
Salt Lake City, Utah 84111  
mkbanks@stoel.com

Michael Jenkins  
PacifiCorp  
201 South Main, Suite 2200  
Salt Lake City, Utah 84111  
michael.jenkins@pacificorp.com

Brian Burnett  
Callister Nebeker  
10 West South Temple, Suite 900  
Salt Lake City, Utah 84133  
brianburnett@cnmlaw.com

Kathryn Collard  
Law Firm of Kathryn Collard, LC  
4265 South 1400 East, Suite A  
Salt Lake City, Utah 84124  
[kathryncollard@gmail.com](mailto:kathryncollard@gmail.com)

Joel Ban  
Ban Law Office PC  
1399 South 700 East, Suite 3  
Salt Lake City, Utah 84105  
[joel.ban@gmail.com](mailto:joel.ban@gmail.com)

  
Christian C. Stephens